IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.09.2007

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

W.P.No.16020 of 2007
M.P.No.1 of 2007

M/s.Nehru Service Centre,
rep. by its Partner M.R.Muthuraman ... Petitioner

vs.

The Deputy Commercial Tax Officer II,
Commercial Taxes Department,
100 Feet Road, Near Indira Gandhi
Statute, Pondicherry. ... Respondent

Writ petitions are filed under Article 226 of the Constitution of India for issuance of Writs of Certiorari, to call for the records of the respondent in Assessment Nos.PGST 201529/2002-03 dated 26.07.2006 and quash the same as illegal, arbitrary and against the principles of natural justice.

For Petitioner : Mr.R.Thiagarajan, Senior Counsel

For Respondents : Mr.E.Vijay Anand
for Government Pleader (Pondicherry)

O R D E R
The petitioner, a registered dealer in petroleum products, under the Pondicherry Sales tax Act and Central Sales Tax Act. He has challenged the order of assessment dated 26.07.2006
2. Brief facts leading to the Writ Petition are as follows:
The petitioner states that the petroleum products were supplied by Indian Oil Corporation, Chennai and the payment was made by way of Demand Draft. He has received 'C' declaration forms as per Section 8(4) of the Central Sales Tax Act in order to avail the concessional rate of tax at 4%, as the Petrol, Diesel and other lubricating oils are taxable at 11% at the point of first sale. Based on the purchase orders placed by the petitioner, the seller, viz., the Indian Oil Corporation, a registered dealer under the TNGST Act, 1959, despatched the petroleum products to the petitioner. The petitioner ought to have obtained 'C' declaration forms from the respondent and issued to the seller, viz., the Indian Oil Corporation, Chennai. If no 'C' declaration forms were filed by the petitioner, the seller would charge higher rate of tax at 30% and the price of the petroleum products will be more compared to others. For the assessment year 2002-03, the petitioner has filed the monthly returns along with the tax and finally the total and taxable turnover was assessed at Rs.6,84,75,296.29 and Rs.6,63,73,369.29 respectively by the respondent in his proceedings in 201529/2002-03 dated 04.05.2004 under Section 13(1) of the Pondicherry Government Sales Tax Act, 1967 (hereinafter referred to as 'the PGST Act).

3. Based on the purchase extract obtained from the seller at Chennai, the respondent proposed to revise the assessment under Section 18(1) of the PGST Act, 1967 and purpose to levy penalty under

Section 18(2) of the said Act. On receipt of the notice dated 26.04.2006, the petitioner by letter dated 05.05.2006 requested the respondent to furnish a copy of the purchase extract and the same was furnished by the respondent on 15.07.2006, for verification and reply. On verification of the accounts, the petitioner found that the purchases were not effected by them and there was no evidence of filing 'C' declaration forms or payment of amount by way of Demand Draft. Therefore, the petitioner approached the seller in person and requested him to furnish the statement of accounts for the last three years. In the mean while, the petitioner has received the revised notice dated 14.07.2006, in which, more purchases were included than the earlier proposals contained in the notice dated 26.04.2006 and the petitioner was called upon to submit their objections.

4. The petitioner has submitted that it is not known as to how the new purchase details were included in the revised show cause notice and the respondent himself is not sure about the figures mentioned against the purchase extract, said to have been obtained from the Indian Oil Corporation. It is submitted that even though the petitioner had approached the sellers for giving statement of accounts, they have not received any particulars. The respondent has also not furnished any details, such as, movement, payment particulars and 'C' declaration forms issued by them, against the goods said to have been received by them. Inspite of furnishing all these particulars, the respondent has passed the revised order of assessment dated 26.07.2006 and has imposed huge penalty at 150%. Aggrieved by the revised assessment order dated 26.07.2006 for the period 2002-03, the petitioner filed an appeal before the Appellate Authority, which was rejected for non-payment of 25% of the tax amount as pre-deposit, which works out to Rs.21,52,231/-. After raising huge dues, the respondent has communicated the same to the seller, viz., Indian Oil Corporation Limited and requested them not to supply petroleum products, in view of the arrears. Being aggrieved by the revised order of assessment dated 26.07.2006, the petitioner has filed this present writ petition.

5. Mr.R.Thiagarajan, learned senior counsel appearing for the petitioner submitted that as per the original notice dated 26.04.2006, the petitioner was directed to submit their objections before 24.07.2006. Thereafter, the respondent issued a revised show cause notice by letter dated 14.07.2006, in which, more purchase details were included. But the time for submitting the objection was not extended. The petitioner had been requesting the seller, viz., the Indian Oil Corporation to furnish details, such as movement particulars, payment particulars and 'C' declaration forms to prove that the goods were actually received by the petitioner. Since the assessing authority did not the extend time, the petitioner could not get the above said details and file their objections in time. Learned counsel for the petitioner further submitted that the respondent ought to have extended the time to enable the petitioner to submit their objections.

6. Learned senior counsel for the petitioner submitted that since the third party records were relied on for revising the assessment, the assessee ought to have been given an opportunity to cross-examine the witnesses to rebut the transactions. He further submitted that where gross injustice is done, the aggrieved person need not go before the authority by way of an appeal or revision, and there is no bar to approach the High Court under Article 226 of the Constitution of India. In support of his contentions, he placed reliance on the following decisions,

i)Bandari and company v. Joint Comml. Tax Officer reported in 1971 (28) STC 465
ii)State of Tamil Nadu v. Sri Rajalakshmi Colour Company reported in 99 STC 154
iii)State of Tripura v. Manoranjan Chakraborty reported in 2001 (10) SCC 740
iv)Sri Mahalakshmi Trading Company v. Commr. of Comml. Taxes reported in 1984 (57) STC 53

7. Mr.E.Vijay Anand, learned counsel appearing for the respondent submitted that the show cause

notice dated 14.07.2006 was issued calling upon the petitioner to submit their objections by 24.07.2006. On perusal of the invoice-wise purchase details, it was found that there were more purchases and therefore, the earlier notice dated 24.06.2006 were superseded and a revised notice for the escaped goods or purchases was issued on 14.07.2006. He submitted that having failed to submit their objections within the stipulated time, it is not open to the petitioner to canvass into the merits of the case before this Court, and if the petitioner is aggrieved by the assessment order, he ought to have filed a statutory appeal under the PGST Act. He further submitted that on facts, there is an escaped turnover to a huge extent and therefore, the petitioner has to prove his case before the appellate authority. Under such circumstances, he prayed for dismissal of the writ petition.

8. I have heard Mr.R.Thiagarajan, learned Senior Counsel for the petitioner and Mr.E.Vijay Anand, learned counsel for the respondent.

9. The impugned revised assessment order reveals that the petitioner, dealer in petroleum products, was originally assessed on a total and taxable turnover of Rs.6,84,75,296.29 and Rs.6,63,73,369.29 respectively by the respondent in his proceedings in 201529/2002-03 dated 04.05.2004 under Section 18(1) of the PGST Act, 1967 and exempted turnover of Rs.21,01,927/- for the assessment year 2002-03 on 04.05.2004. The verification of the purchase details from their vendors, viz., the Indian Oil Corporation, Chennai revealed that the dealer had understated the purchase turnover for the assessment year 2002-03. On detecting the escaped turnover, the respondent has proposed to revise the assessment and accordingly, notice under Section 18(1) of the PGST Act dated 26.04.2006 for levy of tax on the escaped assessment for the year 2002-03, was issued.

10. In response to the said notice, the petitioner has submitted his reply on 05.05.2006, requesting the respondent to furnish the invoice-wise purchase details for verification. Invoice-wise purchase details were furnished on 15.07.2006 and it is evident from those Invoice-wise that there were more purchases than what was stated in the earlier notice dated 26.04.2006. Therefore, the earlier notice dated 26.04.2006 was superseded and a revised notice dated 14.07.2006 was sent to the petitioner. The details of the escaped sales turnover and the proposal to levy tax and penalty, were also furnished in the revised show cause notice. The petitioner, having acknowledged the same, neither sought extension of time nor filed his objections to the proposals and therefore, the respondent confirmed the proposals, made in the notice dated 14.07.2006.

11. Firstly, the petitioner was given time to submit his objections by 24.07.2006 and he was also furnished with invoice-wise purchase details as per his request dated 05.05.2006. If the time granted by the respondent was insufficient, the petitioner should have requested the respondent for extension of time. Atleast the petitioner could have submitted his objections with reference to the details contained in the earlier notice dated 26.04.2006 and expressed their difficulty and sought further time.

12. In State of Tripura v. Manoranjan Chakraborty reported in 2001 (10) SCC 740, the Supreme Court held that where the gross injustice is done, the writ jurisdiction can be invoked notwithstanding the alternative remedy provided under the statute. In the reported judgment, the Supreme Court upheld the validity of the provisions in Section 20(1) and 21(2) of the Tirupura Sales Tax Act barring entertainment of appeal/revision against an order without payment of the amount of tax assessed or penalty levied. The Apex Court observed that in a case of high handed and palpable illegal order, the Court can exercise the jurisdiction de hors the alternative remedy. On facts, the reported judgment is not applicable to the present case, inasmuch as the petitioner has not even submitted their objection to the Assessing Officer, rebutting the contents of the show cause notice.

13. In Bandari and company v. Joint Comml. Tax Officer reported in 1971 (28) STC 465, certain

records were seized by the Police Department and those materials were used by the revenue department for making past assessment. The statements were also obtained from the third parties, which formed the foundation for taking action against the assessee and in this context, this Court held that if the assessing authority is entitled to rely upon information, material and records seized by the police department from third parties, then, there must be an effort to connect the materials so seized with the petitioner and his business. In that context, the Court held that the assessee, an aggrieved person should be given an opportunity to cross-examine the persons, who had given statements against him.

14. In Sri Mahalakshmi Trading Company v. Commr. of Comml. Taxes reported in 1984 (57) STC 53, on the basis of materials collected from the third parties, a raid was conducted in petitioner's premises. A Division Bench of Karnataka High court held that, the assessee ought to have been communicated with full particulars of the materials proposed to be used against him.

15. In a similar case in State of Tamil Nadu v. Sri Rajalakshmi Colour Company reported in 99 STC 154, a Division Bench of this Court held that an assessee should be given an opportunity to cross-examine the third parties.

16. The above reported judgments do not apply to the facts of the present case because in all these cases, on basis of materials and statements obtained from the third parties, raid or vigilance inspection were conducted. In the instant case, on verification of purchase materials obtained from Messrs. Indian Oil Corporation Limited, it was found that the the petitioner had understated the purchase turnover for the assessment year 2002-03. The purchase statement, sales statement, bills and the 'C' declaration form submitted by the petitioner have been duly verified, before passing the impugned order of assessment. The documents relied on by the respondent are only the purchase bills, obtained from the Indian Oil Corporation, who is the seller of the petroleum products to the petitioner-assessee.

17. In M.Krishnaswamy v. TNTST & Ors. reported in 2004-05 (10) TNCTJ 168, this Court dealt with the case of arriving at best judgment assessment de hors the production of records by the assessee. In the present case, to support of their claim, the petitioner had produced the purchase statement, as well as the C form extract and only on verification of the details, the revised assessment was made. Therefore, the assessment made by the assessing authority cannot be said that it is on the surmises and conjunctures. The above reported judgment is not applicable to the facts of this case.

18. The affidavit filed in support of the writ petition discloses that the petitioner had already availed the alternative remedy of filing an appeal before the appellate authority, which has rejected the appeal on the ground that the petitioner has failed to comply with the statutory obligation of paying 25% of disputed tax for entertaining the appeal. Having availed the alternative remedy and failed to fulfill the statutory obligation by paying 25% of the disputed tax, it is not open to the petitioner to short circuit and circumvent the alternative remedy and file the writ petition before this Court. The impugned order cannot be termed as high handed or palpably illegal warranting interference under Article 226 of the Constitution of India.

19. In view of the above, there is no merit in the writ petition and accordingly, it is dismissed. However, it is open to the petitioner to represent the appeal papers, on payment of 25% of the disputed tax. No costs. Consequently, connected Miscellaneous Petition is closed.

04.09.2007
To

The Deputy Commercial Tax Officer II,
Commercial Taxes Department,
100 Feet Road, Near Indira Gandhi
Statute, Pondicherry.

S. MANIKUMAR, J.
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